Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Schools and Libraries Universal Service	)	
Support Mechanism	)	CC Docket No. 02-6
	)	
	)	

JOINT COMMENTS OF BELLSOUTH CORPORATION AND SBC COMMUNICATIONS, INC.

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BellSouth Corporation ("BellSouth"), on behalf of itself and its wholly owned subsidiaries, and SBC Telecommunications, Inc. ("SBC") (Collectively, "Joint Commentors") hereby jointly submit their comments in response to the *Notice of Proposed Rulemaking and Order* ("Notice"), released on January 25, 2002 in the above referenced proceeding.

I. INTRODUCTION AND SUMMARY

1. On January 25, 2002, the Commission released a *Notice of Proposed Rulemaking and Order* ("*Notice*") to "initiate a focused review of certain [of the Commission's] rules governing the schools and libraries universal service support mechanism.[1] The *Notice* also stated the goal of ensuring the continued efficient and effective implementation of the congressional goals established in the statutes, and to explore a variety of suggestions for improving the program.[2] In response to this *Notice*,

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1 *Notice*, ¶ 1.
2 *Id.*

BellSouth and SBC provide their comments on ten separate issues. These include the Eligible Services List, Wide Area Networks, Consortia, Choice of Payment Method, Equipment Transferability, Use of Excess Services in Remote Areas, Appeals, Independent Audits, Prohibitions on Participation, and Unused Funds. More specifically, the position of BellSouth and SBC is as follows on each respective topic:

2. Eligible Service List: BellSouth and SBC believe that it is not possible to establish a comprehensive list of eligible services for two reasons: (1) the potentially eligible services are too complex to prepare a usable listing; and (2) whether or not a service is eligible is frequently determined as much by the usage of the service as by the service itself. As to the first point, a given service, such as Centrex service, can entail hundreds of features or arrangements that an applicant might select as part of that single service. It is not practical to list in a computerized menu the thousands of potential selections from the full panoply of available services. Second, even if this could be done, inclusion in this list of a particular service would not guarantee that it would be eligible, since this would also depend largely on the use that is being made of the service.

3. Wide Area Networks: BellSouth and SBC believe that the Commission set forth an appropriate policy concerning wide area networks in the *Fourth Order on Reconsideration*[3] and that there is no basis to change these policies at this time.

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[3] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge,* CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72,* 13 FCC Rcd 5318, 5430, ¶ 193 (1997) (*Fourth Order on Reconsideration*).

4. Consortia: The *Notice* inquires whether the current rules should be changed so there would be a two-tier pricing structure for the services obtained by Consortia. The joint commentors are opposed to this proposal because it is contrary to the way in which consortia generally function, and it would create the potential for fraud and abuse.

5. Choice of Payment Method: BellSouth and SBC believe that the current practice, that applicants and service providers are to work together to determine an appropriate payment method, should be continued. Most of the problems referred to in the *Notice* are not the result of this practice, but rather of parties not following the practice. Therefore, the joint commentors believe that the best solution would be to simply formalize the practice in a rule.

6. The *Notice* also inquires whether this should be a rule to require that reimbursement be made within twenty days. BellSouth and SBC support such a rule. However, the rule should be drafted so that there is no penalty for minor or occasional failures to make timely reimbursements. Instead, only habitual or systemic failures should be subject to penalties. Finally, the joint commentors suggest that the current notification process be clarified so that applicants receiving a Billed Entity Applicant Reimbursement ("BEAR") notification letter will understand that time must be allowed for the service provider to receive reimbursement and to forward it to the applicant.

7. Equipment Transferability: The *Notice* raises the prospect of putting into place restrictions to ensure that eligible applicants do not inappropriately transfer equipment purchased at a discount to ineligible entities. BellSouth and SBC support such

a rule because it would not only prevent inappropriate gaming of the program, but also ensure that there is no unfair effect on applicants and service providers that are currently adhering to both the letter and spirit of the program.

8. Use of Excess Services in Remote Areas: The Commission granted the state of Alaska a waiver of the rule requiring that supported services be used solely for educational purposes. The *Notice* inquires whether a similar exception should be made in other circumstances, and, if so, whether these circumstances should be formalized in a rule. BellSouth and SBC not only oppose such a rule change, but believe strongly that such a change is not legally sustainable. Section 254(h)(1)(b) of the Act explicitly requires that supported services shall be used "for educational purposes." The only sustainable interpretation of this language is that these services shall be used only for educational purposes, i.e., the interpretation that is embodied in the current rule. Any conclusion that the language of the statute allows non-educational use is contrary to the plain, unambiguous language of the statute, and it cannot be supported under the applicable tenets of statutory interpretation. Thus, allowing non-educational uses of supported services simply cannot be done. Further, even if non-educational uses were allowable (that is, if the law were different), then it would still be both inappropriate from a policy standpoint and from a practical standpoint to attempt to formalize in advance the circumstances in which secondary non-educational use should be permitted. Instead, any requests for non-educational use should be made on a case-by-case basis through the waiver process.

9. Appeals: From time to time, the Commission rules upon an appeal of a decision by the Administrator in a way that makes broad policy. In other words, the decision goes beyond the decision that must be made to rule on the appeal, and sets a policy or standard that is applicable to parties not involved in the appeal. BellSouth and SBC submit that the Commission should adopt a practice in these circumstances of soliciting comments to receive input from all parties that might be affected by the contemplated policy before the policy is formalized in a decision.

10. Independent Audits: The Commission rules should explicitly authorize the Administrator to require independent audits when there is a reasonable basis to believe that they are necessary. As long as these audits are not regular or routine, but are only based upon the existence of circumstances to suggest a need for such audits, then they should not be a burden on any party.

11. Prohibitions on Participation: BellSouth and SBC submit that a ban on program participation is appropriate in circumstances in which an entity is found to have intentionally or repeatedly violated the rules of the program. This sanction should be reserved for serious violations, but if a serious violation is found, the prohibition on participation should be for a substantial time period.

12. Unused Funds: Unused funds should be credited back to contributors to reduce future contributions. Given the current demands on the universal service mechanisms as a whole, this is the most appropriate policy. Moreover, any reductions in contributions would be reflected in lower charges to end users. The alternative use proposed would provide funding above the cap that would go entirely for internal

connections, and largely to entities that do not contribute to the fund. The public interest supports using excess funds to reduce end user charges, rather than to benefit non-contributors.

II. APPLICATION PROCESS

A. Eligible Services List

13. The *Notice* states that currently, "the Administrator makes available on its website a list of categories of service that are eligible or ineligible, though not specific brands or items."[4] The Notice also states that "[a]pplicants or service providers can appeal a determination by the Administrator that a given service is ineligible for discounts only after a requested service has been rejected."[5] The *Notice* inquires whether this situation should be addressed by establishing a computerized list, which would be accessible online, that would allow applicants to select specific products or services as part of their application.[6] Although the Joint Commentors understand the goal the Commission is attempting to accomplish and believe it is laudable, we also believe that the establishment of a detailed, comprehensive list of eligible services is impractical for two reasons: (1) the potential services are too complex to prepare a usable listing; and (2) whether a service is eligible or not frequently has as much to do with the usage of the service as with the service itself.

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4 *Notice*, ¶ 13.

5 *Id.*

6 *Id.*, ¶ 14.

14. Developing an exhaustive list of eligible telecommunications services that participants could use in conjunction with their applications would entail each carrier having to develop a specific list of its products, including each and every potential variation of the product or service, so that the applicant could make its selections. Given the complexity of telecommunications services, it would be all but impossible to do this. To use BellSouth as an example, it offers a variety of services that are generally referred to as Centrex services. These include five discrete classes of services, each of which includes somewhere between 100 and 425 discrete features or arrangements that may be selected. The Centrex services that BellSouth offers and the features of each are as follow:

SERVICE	NUMBER OF FEATURES OR ARRANGEMENTS
Analog ESSX service	150
Digital ESSX service	150
MultiServ service	350
MultiServ PLUS service	100
BellSouth Centrex	425

Thus, an applicant wishing to choose one particular type of Centrex service, for example, Centrex, would have to make choices from a computerized menu of 425 variations. A similar process would be required for each of the five types of Centrex service. All together, these five types of service would require a listing of 1,175 items, just for the single service generically referred to as Centrex. A comparable listing would be needed for every BellSouth product.

15. Moreover, if the list included pricing information, the complexity and potential confusion would increase exponentially. Again, using BellSouth as an example, many of the BellSouth products that are eligible are priced differently from state to state (e.g., flat rate business lines). For these services, there would have to be a separate price listing for each feature of each service, and for each of the nine states in BellSouth's region. Adding together all of the potentially eligible services offered by BellSouth would result in a menu that includes tens of thousands (or more likely, hundreds of thousands) of specific elements that a customer could select. BellSouth and SBC submit that this would result in more applicant confusion rather than less. Also, this would be a massive undertaking that would divert resources without clear beneficial results.

16. Even if the task of developing a comprehensive menu could be accomplished, it would still not provide the applicant with a definitive decision on the eligibility of the services listed. Services are eligible or not, based on multiple factors, including the nature of the service, the planned usage and location. This fact is reflected by the number of services on the SLD's current eligibility list that are "conditionally eligible." Therefore, even if it were possible to develop a pull down menu with the thousands of items necessary to allow applicants to select eligible services, there is still no guarantee that their applications would be approved by the Administrator. In fact, such a list could mislead applicants into thinking that services selected are guaranteed approval. Again, while it is laudable to seek a mechanism that would make the application process easier, unfortunately, developing a comprehensive and detailed menu of eligible services is not the answer.

B. Wide Area Networks

17. The *Notice* requests comment on whether the Commission should change its current policy regarding Wide Area Networks (WAN). BellSouth and SBC submit that no change is necessary. The Commission considered all the pertinent issues in its *Fourth Order on Reconsideration*[7] and came to the correct conclusions regarding the classification of, and support for, WANs. Specifically, BellSouth and SBC agree with the Commission's decision that "to the extent that states, schools or libraries build and purchase wide area networks to provide telecommunications, the cost of purchasing such networks will not be eligible for universal service discounts."[8] BellSouth and SBC also agree with the Commission's decision that WANs owned by applicants do not fall into the narrow provision that allows support for Internet access because WANs provide broad-based telecommunications. Finally, BellSouth and SBC agree that schools and libraries should be allowed to receive support for WANs provided over leased telephone lines because such an arrangement constitutes a telecommunications service.

18. The *Notice* also seeks comment on whether its decision in the *Tennessee Order*[9] to consider "leased WANs as a Priority One service has led to a fair and equitable

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[7] *Fourth Order on Reconsideration*, 13 FCC Rcd at 5430, ¶ 193.

[8] *Id.*

[9] *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, *Order*, 14 FCC Rcd 13734 (1999) ("*Tennessee Order*").

distribution of funds."[10] On this topic, the *Notice* states that "[s]ome parties have suggested that the marked increase in demand for Priority One services arises from applicants leasing equipment from telecommunications providers for which they are likely to receive discounts rather than purchasing the equipment as internal connections, which have a high likelihood of not being funded under the current priority rules."[11] These parties are wrong for two reasons.

19. First, the *Tennessee Order* addressed the funding of network equipment owned by the service provider. Applicants do not "lease equipment" from telecommunications providers. Instead, the applicant purchases a service, which includes equipment that is part of the telecommunications provider's network. Under the *Tennessee* decision, any equipment that qualifies for support does so because the equipment is part of the service delivered through the provider's WAN. In other words, the applicant is purchasing a service that includes a network equipment component.

20. Second, there are clear distinctions between equipment used for internal connections and equipment that is part of a WAN. Since any WAN equipment must be owned by the service provider, and must be an integral part of the service provider's provision of network service, it cannot constitute an internal connection. Conversely, it would also be improper to categorize equipment used for internal connections as a Priority One service under the *Tennessee* decision, since equipment that is to be used for internal connections cannot be part of the service provider's network.

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[10] *Notice*, ¶ 20.

[11] *Id.*

21. The distinction the Commission makes is clearly one of function and ownership rather than of location. The distinctions between equipment used in WANs and internal connections are set forth clearly in the WAN fact sheet provided on the website of the Schools and Libraries Division of USAC. This Fact Sheet also provides appropriate tests to determine when the equipment on an applicant's premise qualifies as part of a Priority One WAN network service, as opposed to internal connections. The fact sheet reflects criteria that clearly relates to function and ownership, rather than location. Specifically, in order for the provider- installed equipment to qualify as part of a WAN, rather than internal connections, the following conditions must be met.

- It will be provided by the same service provider that provides the service, and ownership will not transfer to the school or library in the future.
- The relevant contract or lease does not include an option to purchase the equipment by the school or library.
- The school or library has no contractual right to exclusive use of the equipment.
- Up-front, non-recurring charges are less than 67% of total charges (recurring plus non-recurring charges).
- The equipment will not be used by the school or library for any purpose other than receipt of the eligible Telecommunications Services or Internet Access of which it is a part.
- The Local Area Network for data communications of the school or library is functional without dependence on the equipment.
- Responsibility for maintaining the equipment rests with the service provider, not the school or library.[12]

22. Therefore, the suggestion of some parties that demand for Priority One services has increased because applicants are leasing equipment rather than purchasing the same equipment for internal connections could only be accurate, if applicants are

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[12] WAN Fact Sheet, website for Schools and Libraries Division of USAC (www.sl.universalservice.org), p. 3-4.

miscategorizing equipment on a massive scale. If this problem does exist, it can best be remedied by enforcing the existing rules, not by discarding the appropriate policy decisions of the *Tennessee Order*.

23. Finally, any increase in Priority One demand that may exist is not the result of the Commission's policy on WAN. Any increase in demand for WANS is the result of current market demand, which reflects the geographic nature and size of the applicants that need to communicate. Specifically, increases in Priority One service are a function of the normal expansion of the program to an increased number of applicants, and an increase in their ability to fund Priority One services through program support. Further, any increase in demand for Priority One services is likely a function of the amount of internal connections the program has funded to date. More schools are able to take advantage of telecommunications services than in the past because their classrooms are now wired. This increase in internal connections may, in turn, require more telecommunications network services to accommodate the increased needs of applicants. Thus, the increase in Priority One demand represents the normal and reasonable growth in the use of these services by applicants.

C. Consortia

24. In the *Notice*, the Commission seeks comment "on whether to clarify the rule to establish clearly that only ineligible private sector members seeking services as part of a consortium with eligible members are prohibited from obtaining below-tariffed rates from providers that offer tariffed services (tariffed providers)."[13]

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[13] *Notice*, ¶ 31.

25. Under the rule change contemplated in the *Notice*, there would be a two-tier pricing structure for the services obtained by the consortium members: the tariffed rate would be paid by the private sector members, while a discount could be negotiated on behalf of the eligible members, who would also receive an additional discount in the form of universal service support.[14] This dual pricing structure would increase the potential for fraud and abuse since it conflicts with the natural purpose of joining a consortium, which is for all members to benefit equally from the combined buying power.

III. POST COMMITMENT PROGAM ADMINISTRATION

A. Choice of Payment Method

26. The *Notice* raises two discrete issues regarding the choice of payment method: (1) whether service providers should be required to offer applicants a choice of payment method; and (2) whether service providers should be required by rule to make reimbursement to applicants within 20 days.

27. BellSouth and SBC agree that service providers should be able to offer a choice of payment methods. BellSouth and SBC also submit that any new rule should formalize the current procedural recommendation that carriers and applicants mutually agree on a payment method.

28. As stated in the *Notice*, the existing Administrator's procedures advise providers and applicants to work together to determine whether the applicant will (1) pay the service provider the cost of the services and subsequently receive reimbursement after

[14] This arrangement begs the question of why a private sector entity would join in a consortium when membership provides it with no benefit whatsoever.

the provider receives reimbursement through the BEAR process, or (2) pay only the non-discounted portion of the cost of services, while the service provider would obtain reimbursement from the administrator for the discounted portion.[15] The *Notice* expresses concern that because the Commission's rules do not clearly state who makes the final determination as to the method of payment, some providers may require all recipients to use a single method. BellSouth and SBC submit that to the extent any provider is systematically limiting the options of participants, this provider is not complying with the existing procedure. Again, the existing procedure is that the applicant and the service provider should work together to determine how the discount would be applied. To the extent that either a service provider or an applicant unilaterally makes the decision as to which payment option to utilize, this practice is contrary to the idea of working together to arrive at a mutually agreeable arrangement.

29. The Joint Commentors believe that the best solution would be to simply formalize the current procedures in a rule that would 1) require providers to offer a choice between the discount option and the BEAR reimbursement option, and 2) require providers and applicants to arrive at a selected payment method through mutual agreement. The mutual agreement process recognizes that there are factors outside of the control of either the applicant or the service provider which may have an impact on which payment option is most appropriate. For example, some of these factors include timing of funding commitment notification (i.e., long after service has been provided),

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[15] *Notice*, ¶ 33.

state regulations or discount programs, resource and system limitations, and school budgeting issues, to name just a few.

30. As to the proposal of the *Notice* to create a rule to require that all reimbursements be remitted within 20 days of having received them, BellSouth and SBC generally support this proposal. BellSouth and SBC believe that the BEAR reimbursement system is an efficient and effective option. At the same time, in order for this system to remain viable, reimbursement payments must be made to applicants promptly. BellSouth and SBC believe that the requirement that remittances be made within 20 days of having received them is reasonable, and that this standard should be met by service providers most of the time.

31. At the same time, it must be noted that there will be instances in which, for one reason or another, remittances cannot be made within this time period. Therefore, if this requirement is formalized by rule, the rule should be written to make clear that it is intended to address substantial or systematic failures to meet the 20-day requirement. There should be no enforcement of the rule to address justifiable tardiness or tardiness that occurs only occasionally. By "justifiable tardiness," BellSouth and SBC refer to failures to timely remit reimbursement that are beyond the control of the service provider. Clearly, a failure to remit should not constitute a rule violation if the service provider has no fault in the matter.

32. Also, there should be no rule violation unless failures to meet the 20-day requirement are habitual. The *Notice* makes reference to Section 503, which provides for

the imposition of penalties when the violation of a rule is "willful" or "repeated."[16] BellSouth and SBC are concerned that these provisions could be applied in an inequitable way. For example, assume a provider makes timely remittances to participants 5,000 times over the course of a year, but makes late remittances (i.e., in more than 20 days) five times. If the rule requires that every reimbursement be made within 20 days, the above-described situation represents five "repeated" violations over the course of the year. Thus, strictly speaking, a penalty could be assessed, even though the provider's performance (i.e., on time 99.9%) is exceptional under any reasonable standard. While BellSouth and SBC find it unlikely that the Commission would apply § 503 in such a draconian fashion, we also believe that it is unwise to create a rule that is so susceptible to unfair application. Therefore, if the 20 day requirement is made a rule, then there should be qualifying language in the rule to limit the imposition of penalties to those instances in which failure to comply is the fault of the carrier and is substantial and/or systematic.

33. The Joint Commentors also suggest a clarification be made to the current notification process to alleviate confusion. The current BEAR notification letter contains language to notify the applicant that USAC has released its reimbursement to the service provider. Making this statement without clearly stating a timeframe by which the applicant should expect reimbursement from the service provider can cause confusion for all parties. The applicant may expect immediate delivery of the service provider check, even though the service provider has yet to actually receive reimbursement from USAC.

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[16] 47 U.S.C. § 503.

This problem can be addressed by including text in the BEAR notification letter to state that time must be allowed for delivery of the USAC reimbursement to the service provider, and the service provider will remit reimbursement to the applicant within 20 days of receiving reimbursement from USAC.

B. Equipment Transferability

34. The *Notice* states that, although eligible services cannot be transferred for money (or anything of value), there is nothing to prevent transfers of equipment without payment or other consideration.[17] The *Notice* also refers to anecdotal accounts of eligible participants replacing their equipment and transferring on a yearly basis that equipment to schools or libraries that would have been ineligible during the funding year to receive discounts for internal connections due to their lower discount rates.[18] The *Notice* inquires whether this practice should be addressed by the imposition of a rule limiting the replacement of internal connections other than cabling to no more than every three years and limiting cabling replacement to ten years.[19]

35. The Commission must act to prevent gaming of the program in this fashion. Action designed to ensure that applicants are making significant use of their internal connections equipment before seeking funding for new equipment is not only reasonable and appropriate, but also necessary. To do otherwise is to discriminate against other applicants and service providers that are adhering to the intent of the

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[17] *Notice*, ¶ 37.

[18] *Id.*

[19] Under this proposal, a participant replacing equipment more frequently could receive discounts on the new equipment only if it traded the old equipment to its service provider. *Notice*, ¶ 39.

program. If there is evidence that applicants are unnecessarily limiting the availability of internal connections funding by moving equipment between schools, a rule compelling applicants to retain equipment at a site for three years, and cabling at a site for ten years, is appropriate. Such a policy may give rise to some minimal additional administrative costs, but would almost certainly ensure that the benefits of the program are extended to additional applicants, a policy aim that would justify any potential administrative costs.

C. Use of Excess Services in Remote Areas

36. On December 3, 2001, the Commission granted the State of Alaska a limited waiver[20] of Section 54.504(b)(2)(ii), which provides that "the services requested will be used solely for educational purposes."[21] The *Notice* requests comment on whether the rule should be changed to allow excess capacity obtained through the universal service mechanism for schools and libraries to be used for something other than educational purposes.[22] The *Notice* also invites comment as to the circumstances under which non-educational uses would be appropriate.

37. BellSouth and SBC oppose a change to the rule because (1) the contemplated change would violate the express language of the Act; (2) even if the change were legally permissible, it is not appropriate as a matter of public policy; and (3)

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[20] *Federal-State Joint Board on Universal Service, Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, *Order*, FCC 01-350 (rel. Dec. 3, 2001) ("*Alaska Order*").

[21] 47 CFR § 54.504(b)(2)(ii).

[22] *Notice*, ¶ 45.

the contemplated change would be extremely difficult to administer, and would give rise to a myriad of opportunities for fraud or abuse.

38. First, the proposed change to Section 54.504 would violate the express language of the Act. The pertinent language of the Act is as follows:

> (B) EDUCATIONAL PROVIDERS AND LIBRARIES.—All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties . . . .[23]

Thus, the language that must be interpreted is the requirement of the Act that the discounted services be used for educational purposes. The interpretive principles that must be applied to discern the meaning of this language are well settled and often repeated. In essence, it is necessary to give effect to the intent of Congress by applying the plain and unambiguous language of the statute. Although the principles that follow from this basic tenet appear in cases too numerous to count, the applicable rules of construction were set forth succinctly by the Ninth Circuit in *Adams v. Morton*[24] as follows:

> We are governed by the uniform rule of construction that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive. [citations omitted] In other words, a court interpreting a statute may not depart from its clear meaning [citations omitted], and where the statute plainly expresses the will of Congress in language that does not permit or require a strained interpretation, words thereof may not be extended or distorted

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[23] 47 U.S.C. § 254(h)(1)(B) (emphasis added).

[24] 581 F. 2d 1314, 1320 (9th Cir. 1978).

> beyond their plain popular meaning. [citations omitted] The court's first duty in construing the statute is to effectuate the express intent of the Congress. [citations omitted].

Further, in effectuating the express intent of Congress, the tribunal should avoid interpretations that lead to obscure or unreasonable results.[25] Also, the tribunal cannot omit or add to the plain meaning of the statute.[26]

39. Although the above-cited authority applies generally to statutory interpretations by courts, the standard is no different when the Commission is faced with the task of applying an unambiguous statute. In *Chevron USA Inc. v. Natural Resources Defense Council,* the Supreme Court articulated the standard that courts must apply when reviewing a statutory interpretation by an administrative agency. Specifically:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[27]

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[25] *See, American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Sode v. United States*, 531 F. 2d 531 (U.S. Ct. Cl. 1976).

[26] *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 736 F. 2d 1320 (9th Cir. 1984).

[27] *Chevron USA Inc. v. Natural Resources Defense* Council, 467 U.S. 837, 842-43 (1984). See *also Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 467 U.S. 837, 842-43 (1984), which states the proposition that an agency interpretation cannot be sustained if it conflicts with the clear language of the statute.

40. Applying this standard, it is clear that the contemplated change to the rule is impermissible because it conflicts with the clear, unambiguous statutory language. Again, the operative language of the Act contains the requirement that the discounted services shall be used "for educational purposes." The Commission originally (and properly) interpreted this provision in the manner suggested by the plain meaning of the words selected by Congress, as reflected in the requirement of § 54.504(b)(2)(ii) that the services in question shall be used solely for educational purposes. This is the only interpretation that is consistent with the language of the Act.

41. Nevertheless, in the *Alaska Order*, the Commission determined that it is somehow consistent with this plain language to allow discounted services to be used for something other than educational purposes. The *Alaska Order* states that the statutory provision does not prohibit the Commission from granting a waiver of the rule requiring that services be used solely for educational purposes "so long as in the first instance they are used for educational purposes."[28] Thus, the Commission has created through interpretation an exception to the requirements of the statute, which does not appear in the statute. Rather than applying the plain language chosen by Congress, the Commission has impermissibly added to this language to reach a result that cannot possibly follow from the actual language. Through this process, the clear edict that services are to be used for educational purposes is read to allow non-educational uses.

42. Moreover, the *Alaska Order* fails to give any indication of how the term "in the first instance" should be defined. This newly articulated standard is, standing

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[28] *Alaska Order*, ¶ 8.

alone, so ambiguous that it would be susceptible to virtually any interpretation. Implicit in a discussion of "excess" capacity is the idea that the capacity of the services should be principally used for its intended purposes, i.e., educational purposes. The Commission's declaration, however, that the purpose need only be educational "in the first instance," gives rise to the possibility that as long as there is some minimal educational use of the service to justify the discount, the services could be used predominantly for other purposes. Clearly, there is no other part of the *Alaska Order* (or of the *Notice*) to suggest that this result is the Commission's intention. However, this untenable result does flow from the interpretation of the statute that the Commission has made by effectively grafting onto the language of the statute a broad exception to the requirement of educational use, an exception that Congress could not have intended.

43. Therefore, this interpretation must also be rejected because it creates ambiguity that is not present in the statute as written. If the plain language of the statute is given effect (i.e., that the service shall be used for educational purposes), this language is easy to apply. The language prohibits other uses. However, the phrase "in the first instance" is susceptible to a wide range of interpretations, and, thus, it is very difficult to apply. The Commission has taken a plain and unambiguous statute, and added to it an ambiguous exception that is now in need of interpretive clarification. This, of course, gives rise to the current necessity to solicit comments as to how to address this ambiguity, i.e., how to define the instances in which non-educational use is appropriate.

44. To be sure, there are provisions of the Act that are written in broad strokes, and which require the Commission to fill in gaps in order to clarify ambiguity

that would otherwise exist. The subject provision of the Act does not fall into this category. The proscription that discounted services shall be used for educational purposes is clear on its face. For this reason, there is no need for interpretation. Instead, the Commission must apply the plain meaning of the statute. Doing so results in the only sustainable interpretation, that the language in the statute requiring that the funds be used "for educational purposes" means that they be used solely for educational purposes.

45. Even if the implicit legal problems in the proposed modification could be put aside (and they cannot), the modification should still be rejected, as previously stated, for a second and third reason: it is inappropriate as a matter of policy; it would create a myriad of practical problems. The *Notice* addresses the prospective rule change in three ways: (1) it invites commentors to opine on the sort of circumstances (beyond those involved specifically in the Alaska waiver) that would justify other non-educational use of excess capacity in the future.[29] (2) The *Notice* inquires as to whether the safeguards listed in Paragraph 46 of the *Notice* should be put in place. (3) The *Notice* requests input on how to "ensure" that the revised rule does not impose additional costs on the schools and library program, and that applicants will not request services or capacity beyond what is needed for educational purposes.[30] The answers to these questions provide a clear demonstration that the proposed modification is ill-conceived. Respectively, (1) there are no circumstances that would justify the advance approval of non-educational uses of excess capacity; (2) the safeguards listed in Paragraph 46 are appropriate (with the

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[29] *Notice*, ¶ 45.

[30] *Notice*, ¶ 47.

possible exception of the fifth listed condition), but they are not nearly enough; and (3) the reality is that if this modification is made, it will be impossible to ensure that there will be no additional costs and no abuse or fraud.

46. The Alaska waiver petition was granted under special circumstances. The petition proposed to make the excess capacity of existing services available to rural communities that are extremely isolated physically, that have little access to advanced telecommunications services (including use of the Internet), and that pay extremely high prices for the limited Internet usage that is available.[31] The Commission approved the waiver petition based upon these unique circumstances, and crafted unique restrictions in an attempt to ensure that the excess capacity was used in a way that the Commission considered to be appropriate.

47. To begin with the obvious, the likelihood of encountering another situation like Alaska is almost nonexistent. The remoteness of the rural communities in question are likely not duplicated anywhere else in the United States. Further, to the knowledge of BellSouth and SBC, there is no other area in the United States that does not have toll free access to the Internet, either through local exchange service or toll free 800 service. It is highly unlikely that there is any other eligible participant that would qualify for a waiver under the terms that supported the waiver in the Alaska case. Perhaps for this reason, the *Notice* does not inquire whether to formalize the Alaska waiver in the form of a rule that would allow exceptions for other eligible participants in the same

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[31] *See, Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, Request for Waiver and Declaratory Ruling, filed Jan. 29, 2001 at 5-12 ("Alaska Petition").

circumstances. Instead, the *Notice* invites the parties to postulate situations in which, for other reasons that have not yet been defined, discounted services provided for educational purposes should be made available for other purposes. At the same time, the *Notice* invites opinions as to what restrictions would be appropriate to apply in these currently undefined situations. BellSouth and SBC respectfully submit that this is the wrong approach.

48. Even if one assumes that the clear language of the statute allows discounted services to be used for something other than education, which it does not, there is no good reason to formalize a process in which these services would be routinely used for anything other than educational purposes. In other words, the Act reflects an obvious intent to provide universal service funding to support services for educational uses. Even if other uses are allowable, this does not mean that other uses should be formally sanctioned in a way that would encourage schools, libraries or communities to develop these other uses.

49. At the same time, it is virtually impossible to define prospectively the particular factual situations that would make these "other uses" appropriate. Again, the Alaska waiver was granted on the basis of very specific facts that, in the Commission's judgment, appeared to justify deviation from the rule that these services should be used only for educational purposes. If a different eligible member believes an exception of a different sort should be made, then the appropriate way to raise this would be through a

waiver request that sets forth the pertinent specific facts.[32] This would allow the Commission to make a fact-specific determination. The waiver process is the appropriate means to handle unique situations that may ostensibly justify an exception.

50. In contrast, the *Notice* contemplates a procedure in which an exception would literally become a rule. Parties have been invited to opine, in advance, as to the factual circumstances that should allow services utilized for educational purposes "in the first instance" to be used for other purposes. Once this process is complete, an eligible applicant would presumably submit an application for this use, based on the claim that its specific circumstances fit the model. However, the ways in which excess capacity could be used are virtually infinite. Considering that each use would differ based upon the eligible member, the nature of the community, the composition of the community, the particular services for which there is excess capacity, and the possible uses, it is obvious that the multiplication of these factors can result in an astounding variety of possible uses. Even if non-educational purposes were legally permissible, it is simply not practical to attempt to come up with a rule that would formally dictate with an acceptable degree of specificity the instances in which secondary use of these services for non-educational purposes would be justifiable from a factual standpoint.

51. Further, even if it were possible to define in advance the circumstances that would support non-educational use, a determination that a specific situation satisfies the criteria would be equally problematic. If the Commission were to make a rule change

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[32] BellSouth and SBC do not intend to suggest that the grant of a waiver for non-educational purposes is legally permissible, but only that exception requests should be addressed through the waiver process on a case-by-case basis.

to define circumstances in which excess capacity could be used for non-educational purposes (i.e. in contravention of the controlling law), then it would also have to define the method by which a party qualifies to be covered by this new rule. In this situation, a self-certification process would not be appropriate. Such a process would create extreme opportunities for potential fraud and abuse, which would undermine the integrity of the entire program. Instead, certification by applicants that they meet the criteria would have to be scrutinized through audits or other monitoring, which would, of course, add substantially to the expense of administering the program.

52. The fundamental problem is that the *Notice* proposes to take a waiver granted upon specific factual circumstance and create from that a different broader set of possible circumstances that might occur in the future, and to determine that these circumstances should necessarily prompt comparable treatment. The far better approach is to use the waiver process that is in place if there is a demonstration of circumstances to justify a waiver that is permitted by the statute.

53. While the restrictions set forth in paragraph 46 of the *Notice* are generally useful, they do not go far enough. Part of the problem arises from attempting to define the restrictions that would be appropriate to prevent the abuse of a rule that has not yet been defined. In other words, since the circumstances in which non-educational uses would ostensibly be appropriate have not been defined, it is extremely difficult to craft restrictions that would make sure that these circumstances are present, and that this new broader use of supported services is not abused. Perhaps as a result of this difficulty, the

proposed conditions in Paragraph 46 reflect a relaxation of the conditions that were required in the *Alaska Order*.

54. In the *Alaska Order* (as in the *Notice*), there are five principle restrictions that are placed on this use of excess capacity. However, the Alaska restrictions are different, and stricter. For example, the first condition required as a predicate to granting the Alaska waiver was that "there [was] no local or toll free Internet access available in the community."[33] In the *Notice*, however, there is no such proposed requirement. Moreover, the second condition upon which the Alaska waiver was premised was a specific finding that "the school or library has not requested more services than are necessary for educational purposes."[34] Again, this restriction does not appear among those proposed in the *Notice*. Instead, the *Notice* proposes the condition that schools and libraries request only what is "reasonably necessary" for educational purposes. However, even this looser standard would be extremely hard to police, due to the difficulty of defining precisely the services that are "reasonably" necessary for educational purposes. This difficulty would have the unavoidable result of creating expanded opportunities for fraud and abuse.

55. Again, the fundamental problem is that the Commission is attempting to create restrictions to ensure that there would be no abuse of some broader category of non-educational use of excess capacity that has not been defined. Even if non-educational uses were allowable (and they are not), the better approach would be to grant

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33 *Alaska Order*, ¶ 6.

34 *Id.*

waivers from the requirement that the services be used for educational purposes only when specific circumstances dictate this result, and to define the appropriate restrictions based on specific facts as well.

56. Finally, the fifth condition discussed in the *Notice* appears to attempt to limit a situation that simply should not be allowed. The proposed condition (which was also imposed in the *Alaska Order*) would require that excess services[35] be made available to all capable service providers in a neutral manner. In Alaska, of course, the excess capacity of the services was being used by community members that did not otherwise have access to Internet service. In contrast, the above-noted condition appears to contemplate that the beneficiaries of the rule change (i.e., the users of the excess capacity) would not be customers, but rather providers of services, that is, competitive carriers. At the same time, the applicable rules do not allow the resale of discounted services, so the service providers could not provide any compensation for this benefit to schools and libraries, or to their communities.[36] Thus, the intended purpose of this restriction is (as explained in the *Alaska Order* while imposing the same condition) to "ensure that excess services are not transferred in exchange for any benefit to the school, library, or surrounding community, whether the benefit is a promise of particular services, prices, or other thing of value."[37]

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[35] The discussion of excess "services" is somewhat confusing since the Alaska waiver dealt specifically with the use of excess capacity. BellSouth and SBC assume that the Commission is using these terms interchangeably.

[36] This restriction provides yet another example of an aspect of the proposed modified rule that would be extremely difficult to police.

[37] *Alaska Order*, ¶ 17.

57. While this restriction is consistent with the prohibition against resale, it would create an extremely strange situation. The above-described condition appears to contemplate a situation in which the excess capacity would be given to a particular service provider with the requirement that there would be no compensating benefit to the school or library. Instead, the only direct benefit would be to the fortunate individual service provider that is allowed to use the excess capacity. In apparent recognition of the fact that the grant of this excess capacity to a provider would provide it with a benefit over other providers, the proposed condition also requires selection of the provider by neutral criteria.[38] Thus, this condition creates a situation in which the excess capacity provides no direct benefit to anyone, except one of many competitive carriers, who is, by the luck of the draw, given an undue advantage over other service providers with which it competes. This approach carries the obvious potential to have an anti-competitive effect. Further, it is exceedingly difficult to see how this use of excess capacity would serve the purposes of universal service contemplated by the Act, or for that matter, the public interest.

58. In sum, although the *Alaska* Petition involved a unique set of factual circumstances, the applicable statutory provision does not allow non-educational use of services supported by the Universal Service Fund, under the circumstances at issue in *Alaska* or any other. Thus, the Commission should not consider extending the result in *Alaska* to other circumstances because a decision to do so cannot be legally sustained.

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[38] *Notice*, ¶ 46.

IV. APPEALS

59. The *Notice* requests comment on a number of issues relating to the appeals process, most of which relate specifically to the timing of appeals. The *Notice* also seeks comments on any other changes to rules or policies concerning the appeals process "that might further the goals of improving program operation, ensuring a fair and equitable distribution of benefits and preventing waste, fraud and abuse."[39] In response to this request, the Joint Commentors advocate that the Commission adopt a process whereby broadly applicable policies that are implemented as a result of the appeals process are subject to comment by all entities to whom these broad policies might apply.

60. From time to time the Commission rules upon an appeal of a decision by the Administrator by not only resolving the specific issue, but also adopting a policy that has considerably broader application. For example, the Commission sustained an appeal filed by Copan Public Schools, Copan, Oklahoma ("Copan"), in which Copan appealed a decision of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC" or "Administrator") denying its request to change service providers for the 1998 funding year.[40] As noted in *Copan*, Section 54.504(c) makes no provision for instances in which the service provider needs to be changed after a commitment for support has been made.[41] The SLD attempted to fill this gap in the rule

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[39] *Notice*, ¶ 52.

[40] *Request for Review of the Decision of the Universal Service Administrator by Copan Public Schools, Copan Oklahoma, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-26231, CC Docket Nos. 96-45 and 97-21, *Order*, 15 FCC Rcd 5498 (2000). ("*Copan Order*").

[41] *Copan Order*, 15 FCC Rcd at 5499, ¶ 3.

by defining three specific situations in which a post-commitment change of service providers is appropriate. In sustaining the appeal of the Copan Public Schools, the Commission set a substantially broader set of circumstances in which changes in service providers would be allowed.[42] The Commission then, in effect, judged the appeal under the broader standards it announced. Further, the Commission made clear that these new standards would apply prospectively to all future instances in which service providers were changed.[43]

61. Likewise, in a comparable situation, the USAC requested guidance regarding SLD's ability to approve a service change by the Los Angeles Unified School District ("LAUSD").[44] After referring specifically to its *Copan* decision, the Commission again stated the goal of allowing schools and libraries the maximum flexibility necessary to meet their needs. Consistent with this, the Commission concluded that applicants "should be afforded similar freedom to make these types of service changes."[45] Thus, the Commission again made policy in an area in which the SLD had created procedures in the absence of specific guidance from the applicable rule. The Commission rejected the SLD's procedures in favor of broader, more liberal standards. Also, the Commission made it clear that this policy would be applied prospectively.

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42 *Copan Order*, 15 FCC Rcd at 5500-01, ¶ 5.

43 *Copan Order*, ¶ 6.

44 *Request for Guidance by Universal Service Administrator Concerning the Request of Los Angeles Unified School District, Los Angeles, California, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-198056, CC Docket Nos. 96-45 and 97-21, *Order*, DA 01-387 (rel. Feb. 14, 2001) *("LAUSD Order").*

45 *LAUSD Order*, ¶ 9.

62. In both of these instances, the Commission went beyond what, strictly speaking, was required to rule upon the appeal. In other words, the Commission did not find that the SLD had misapplied the practice that it had developed, but instead scrutinized the practice, and determined that a different practice is appropriate as a matter of policy. In each instance, the Commission applied these broad policies, not just to the applicants in question, but to all applicants and carriers on a prospective basis. This approach causes two problems.

63. First, this approach makes it extremely difficult for parties to keep abreast of changes in policy that develop through the appeals process. As the *Notice* stated, as of January 1, 2002, 740 appeals from the Administrator's decisions had been filed.[46] It is extremely difficult for applicants and service providers to keep track of each of these appeals, and of the broad policies that may be adopted by the Commission in ruling upon these appeals. This means that participants, through no fault of their own, may be unaware of major policy or procedural changes, and may, consequently, make errors. These errors waste the time and resources of all parties, including the applicant, the service provider, the Administrator and the Commission (which may have to deal with unnecessary appeals).

64. Second, to the extent that the Commission makes policy through appeals, it is doing so based on only a very specific, limited set of facts. The Commission receives during the appeal process input from only the parties that are directly involved, but makes policy that applies to other parties, who have no opportunity to provide input.

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[46] *Notice*, ¶ 48.

Not only is this approach unfair, it deprives the Commission of the benefit of hearing additional facts or issues that pertain to the broader application of the policy and may, in fact, lead to a modification in the policy. If it is the Commission's intention to continue to make broad policy through these appeals, then it is appropriate to solicit comment from all parties that may be affected, including both applicants and service providers.

65. Both of the above-described problems can be addressed by adopting the practice of soliciting comments in instances in which the Commission contemplates the implementation of a broad policy arising from an appeal. Although it did not involve an appeal per se, the Alaska Order discussed previously provides a model for how this process could be implemented.[47] In that case, the Commission first issued a waiver of the applicable rule that applied only to the entity seeking the waiver. The Commission then (in the instant *Notice*) requested whether circumstances could support a comparable change in the rule that would apply generally. The Commission could use a similar process in cases in which an appeal is used to interpret, clarify, or expand upon a Commission rule in ways that make new policy. To use *Copan* as an example, the Commission could have ruled on only the Public Schools' appeal, then requested from all interested entities comment on whether the policies announced in that case should be adopted generally. This would give notice to all potentially affected parties of the proposed change in policy, and would allow them an opportunity to comment. At the

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[47] As stated previously, BellSouth and SBC do not agree with the Commission's ruling on the *Alaska* petition, but believes that the procedural approach to policy-making in that case provides an appropriate model.

same time, the receipt of comments from a wide variety of entities would make a more complete record that the Commission could utilize in considering the policy in question.

V. ENFORCEMENT TOOLS

A. Independent Audits

66. The *Notice* seeks comment on whether Commission rules should explicitly authorize the Administrator to require independent audits of recipients and service providers, at their expense, when the Administrator has reason to believe that potentially serious problems exist, or at the direction of the Commission.[48] BellSouth and SBC support this proposal. In order to ensure the integrity of the universal service program, it is essential that all parties participating in the program (both recipients and providers) be subject to audits when there is some indication of an existing problem.

67. The *Notice* also specifically inquires as to the impact of an audit requirement on small entities.[49] BellSouth and SBC believe that the audit provision should apply to small entities (including both recipients and service providers) as well as large entities. Any mechanism developed to ensure the integrity of the program, including audits, should be applied to all participants. Further, the expense of independent audits in the circumstances suggested would not be burdensome, even for small entities. The *Notice* does not propose that independent audits would be performed periodically, but only when there is some indication that a serious problem exists. Thus, the expense attributable to audits should not be a regular or ongoing expense. Further,

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48 *Notice*, ¶ 59.

49 *Id.*

service providers and recipients can avoid even this occasional expense by discharging their duties under the program in a way that avoids problems that would give rise to these audits. Given this, BellSouth and SBC believe that the balance is in favor of authorizing independent audits (upon an indication of a potential serious problem) of all entities that take part in the program, even though this will impose certain financial requirements on these entities.

B. Prohibitions on Participation

68. The *Notice* inquires whether the current rules should be amended to bar from the program applicants, service providers or others (e.g., consultants) that intentionally or repeatedly violate the rules of the program.[50] The Joint Commentors submit that the Commission can and should institute such rules. While a ban on participation would be inappropriate to address minor or inadvertent infractions, such as those involving paperwork or adherence to administrative guidelines, a ban should be applied to any entity engaged in serious violations, such as fraud or criminal activity. Further, BellSouth and SBC believe that the decision to impose a ban on any given entity should relate more to the type of violation rather than to the number of violations. While repeated violations could well serve as a proper basis for forfeiture proceedings, a ban on an entity's participation in the program would be too harsh a sanction to apply if the repeated violations are minor. At the same time, a single severe violation, such as one that constitutes a criminal act, could be sufficient to justify a ban. Thus, while the

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[50] *Notice*, ¶ 61.

recurrence of violations could be a factor in determining whether a ban is appropriate, the severity of the violation should be a greater factor.

69. Since prohibition of participation would be reserved for only serious violations, it would be appropriate for the entity found to have committed the violation to be banned for a substantial time period. BellSouth and SBC recommend a three year time period. Any violation that does not justify a prohibition of this duration can be adequately addressed by forfeiture or other appropriate penalties.

70. The prohibition on participation should apply to any entity that engages in a serious violation, including applicants, service providers and others.[51] However, the prohibition on participation should be structured to apply only to the guilty parties. Thus, for example, the actions of a single individual or school should not serve as the basis to exclude an entire state or school district. Again, the prohibition on participation should be tailored to apply only to the individuals or organizations that are responsible.

VI. UNUSED FUNDS

71. The *Notice* seeks comment regarding the appropriate disposition of unused funds.[52] The *Notice* suggests two possible means to dispose of these excess funds: (1) crediting them back to contributors, in effect reducing future contributions; or (2) adding the unused funds to the amount to be distributed in future years in excess of the cap.[53]

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[51] The only exception should be for carriers of last resort. In this case, banning the provider would also effectively deny program participation to all end users in its territory. The better alternative in this situation would be to allow the carrier to continue to provide service to eligible members under the program, while imposing on the carrier financial penalties and strict reporting requirements.

[52] *Notice*, ¶¶ 65, 69-70.

[53] *Notice*, ¶ 70.

BellSouth and SBC believe that crediting the funds to contributors is in the best interest of the Universal Service program as a whole. Further, there is a precedent for this approach in previous action by the Commission. As the *Notice* states, on December 10, 1999, the Common Carrier Bureau released a *Public Notice* in which it expressed an intention to take this approach in a similar situation.[54] Specifically:

> The Public Notice directed USAC to apply one-quarter of the estimated unused balance to reduce the collection requirement of the schools and libraries program in the first quarter of 2000. The Public Notice noted that this action was consistent with Section 54.507 of the Commission's rules and a previous decision by the Commission to permit excess contributions to the rural health care support mechanism to be credited back to contributors.[55]

72. As a matter of policy, using excess contributions to reduce carrier contribution for future periods is the most prudent course of action that the Commission could take. This is especially true in light of the current demands on the Universal Service mechanism and the fact that the Commission has multiple ongoing proceedings to determine the future of Universal Service in a competitive marketplace.[56] In fact, the Commission has tentatively concluded that the current funding mechanism is unsustainable.[57] Given the potential for substantial changes to the USF, coupled with the

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54 *Notice*, ¶ 75, citing to December 1999 *Public Notice.*

55 *Notice*, ¶ 75.

56 See e.g. *Common Carrier Bureau Seeks Comment on Remand of $650 Million Support Amount Under Interstate Access Support Mechanism for Price Cap Carriers,* Public Notice, CC Dockets 96-262, 94-1, 99-249, and 96-45, (rel. Dec. 4, 2001); *Federal-State Board on Universal Service Seeks Comment on Review of Lifeline and Link-Up Service for all Low-Income Consumers,* Public Notice, CC Docket 96-45, (rel. Oct. 12, 2001); *In the Matter of Federal-State Joint Board on Universal Service,* Notice of Proposed Rulemaking and Order, CC Docket 96-45, (rel. Feb. 15, 2002).

57 *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with*

questions regarding the sustainability of the fund, the most appropriate use of unused funds is to reduce future contribution requirements. Any reduction in contributions would, of course, be reflected in lower universal service related charges to end users.

73. Also, the Schools and Libraries program is unique among Universal Service mechanisms in that many service providers who benefit from the fund, do not contribute to it (e.g., internal connections providers.) Since the demand on the fund that is not being met under the existing cap is entirely for internal connections, any funding above the cap would necessarily be distributed for internal connections, and would, thus, largely go to non-contributors. BellSouth and SBC believe that it is in the public interest to use unused funds to reduce end user charges, rather than to increase potential sales and fund disbursements to non-contributors.

74. As stated in the *Notice*, each year a portion of the $2.25 billion available through the program goes unused, primarily because applicants do not use all the funds committed to them.[58] The *Notice* also states an intention to develop a record of the reasons that funds go unused.[59] Applicants are in the best position to reveal why they do not use committed funds. However, the Joint Commentors, in the course of working with

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Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990 Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, FCC 02-43, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, *Further Notice of Proposed Rulemaking and Order*, (rel. Feb. 26, 2002) ("*Contribution and Recovery FNPRM*").

58 *Notice*, ¶ 63.

59 *Notice*, ¶ 68.

customers since the beginning of the program, have noticed several trends that may contribute to funds going unused.

75. Applicants often forecast their anticipated expenses and, in doing so, may build in expenses for anticipated growth (typically 5% to 10%). If the growth is not realized, the funds are not used. In addition, some statewide providers apply for all potential school districts within their state for the entire 12-month funding period. If a given school district does not use the network, or only uses the network for a part of the year, this will result in unused funds. Also, personnel changes in schools sometimes take place during a particular funding year. This can cause delay or omission in processing necessary forms, which may result in unintentionally forfeiting committed funds. In other cases, services for which funding is requested and committed are found by the applicant to be no longer necessary. Although a Form 500 should be filed in many of these cases to cancel the commitment, this form is often not submitted. Therefore, USAC has no notice that these funds are available for other applicants.

VII. CONCLUSION

76. For the reasons set forth above, BellSouth and SBC support changes to the program rules (1) to formalize the current practice of arriving at a payment method through mutual agreement of the applicant and service provider; (2) to appropriately restrict equipment transfers; (3) to allow parties to comment on broad policy issues that arise through the appeals process; (4) to allow independent audits of all parties when there is demonstrated need; (5) to prohibit participation by a party when appropriate; (6) and to return unused funds to contributors. BellSouth and SBC do not believe that the

current rules or practices should be changed in the other areas discussed above. In particular, BellSouth and SBC are opposed to the creation of a rule that would allow non-educational uses of supported services. Such a rule would not only be inappropriate from a policy standpoint, and difficult to administer, it would also violate the plain provisions of the Act in a way that would make it legally unsustainable.

Respectfully submitted,

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Dated: April 5, 2002

CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of April 2002 served the following parties to this action with a copy of the foregoing **JOINT COMMENTS OF BELLSOUTH CORPORATION AND SBC COMMUNICATIONS, INC.** by electronic filing to the parties listed below.

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